Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976
No. 76-262

MORRIS GOLDSTEIN,
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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TOPICAL INDEX

Petitioner prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of California	Page 1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement of The Case	4
Reasons for Granting A Writ	6
1. California Health and Safety Code § 11170.5 is unconstitutionally vague and overbroad and violates the rights of doctors and patients to privacy within the doctor/patient relationship	6
2. The indictment and resulting conviction were based upon prescription records illegally seized from co-defendant, NORMAN BERRY, in violation of the Fourth and Fourteenth Amendments	7
3. The search warrant authorizing the search of the petitioner's office did not meet constitutional standards of specificity in purporting to authorize and direct the seizure of "all files, professional reports and charts" relating to twenty-three named persons, and the trial court erred in denying petitioner's motion to suppress the evidence taken from his office	10
4. Petitioner was denied equal protection and due process of law by the failure of the	

TOPICAL INDEX

	Page
California courts to consider petitioner's attack on the jurisdiction of the Superior Court	13
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Bumper v. North Carolina, 391 U.S. 543 (1968)	9
Burrows v. Superior Court, 13 Cal. 3d 238 (1974)	10, 11, 12
Griffin v. Illinois, 351 U.S. 12 (1956)	16
Griswold v. Connecticut, 381 U.S. 479 (1965)	7
Hebert v. Louisiana, 272 U.S. 312	16
In re Castro, 243 Cal. App. 2d 404 (1966)	7
Marron v. United States, 275 U.S. 192 (1927)	11
People v. Anderson, 29 Cal. App. 3d 551, 105 Cal. Rptr. 664 (1972)	6
People v. Cruz, 61 Cal. 2d 861 (1964)	9
People v. Elliot, 54 Cal. 2d 498 (1960)	15
People v. Gorg, 45 Cal. 2d 776 (1955)	8, 9
People v. Hill, 12 Cal. 3d 731	12, 13
People v. Nunn, 46 Cal. 2d 460, 296 P.2d 813	6

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
People v. Rios, 16 Cal. 3d 351 (1976)	12, 13
People v. Shelton, 60 Cal. 2d 740 (1964)	9
People v. Superior Court (Arketa), 10 Cal. App. 3d 122 (1970)	8
Ross v. Moffitt, 417 U.S.600 (1974)	16
Silva v. Cox, 251 F.2d 61 (10th Cir. 1965)	16
Stanford v. Texas, 379 U.S. 467 (1964)	11
Williams v. Oklahoma, 395 U.S. 458 (1969)	16

Statutes (United States)

United States Constitution	
Fourth Amendment	3, 4, 7, 9
Fourteenth Amendment	7, 14, 16
21 U.S.C. § 812	5
28 U.S.C. § 1257(3)	2

Statutes (California)

Code of Civil Procedure § 1822.50	8
Evidence Code § 994	12
Business and Professions Code	
§ 2399.5	5
§ 2426	5
§ 4232	8

TABLE OF AUTHORITIES CITED

California Statutes (cont'd)	Page
Health and Safety Code	
§ 11162.5	2, 4, 5, 6, 7
§ 11163	4, 5
§ 11170.5	2, 3, 6, 7
Penal Code	
§ 939.6(b)	14
§ 995	5, 16
§ 995 - 999(a)	14
§ 1237.5	15, 16
§ 1538.5	5
Rules on Appeal	
Rule 19.1(a)	2

IN THE SUPREME COURT OF THE UNITED STATES

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No. .....

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THE STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To: The United States Supreme Court, October Term, 1976:

The petitioner, MORRIS GOLDSTEIN, M.D., prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of California dated May 26, 1976, denying a hearing after the affirmance of petitioner's conviction by the Court of Appeal of the State of California, Second Appellate District.

OPINION BELOW

The California Supreme Court denied hearing in the within matter on May 26, 1976, and notified petitioner of its denial through mailing of a postcard. A copy of the postcard notice of denial is appended hereto as Appendix "A" (Appendix p. 1). The Court of Appeal of the State of California, Second Appellate District, filed an opinion in the within matter on March 22, 1976. A copy of the opinion of the Court of Appeal is appended hereto as Appendix "B" (Appendix pp. 2 - 16).

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, was entered on March 22, 1976. The court affirmed the judgment of conviction entered upon petitioner's guilty plea to the crime of giving a false address in connection with the prescribing of a narcotic in violation of California Health and Safety Code § 11170.5 (Count I) and to the crime of unlawfully prescribing narcotics to an habitual user or addict in violation of Health and Safety Code § 11162.5 (Count XII)[1]. A timely Petition for Rehearing was filed with the Court of Appeal on April 5, 1976 and subsequently denied. A Petition for Hearing to the Supreme Court of the State of California was denied on May 26, 1976. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. § 1257(3) and Rule 19.1(a).

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[1] All references to Health and Safety Code refer to the state law of the State of California.

QUESTIONS PRESENTED

1. Whether the constitutional right of the petitioner, a medical doctor, and his patients, to privacy in the doctor-patient relationship, are violated by Health and Safety Code § 11170.5, which provides: "No person shall, in connection with the prescribing, furnishing, administering or dispensing of a narcotic, give a false name or false address"?

2. Whether the search warrant authorizing the seizure from petitioner's office of numerous patients' files, professional reports and charts authorized an overbroad and exploratory search in violation of the Fourth Amendment to the United States Constitution?

3. Whether petitioner's conviction is based upon evidence obtained in an illegal search of a co-defendant's pharmacy records carried out by members of the California State Bureau of Narcotics?

4. Whether petitioner has been denied equal protection and due process of law and meaningful appellate review by the Court of Appeal's failure to consider various points raised on appeal?

STATUTES INVOLVED

United States Constitution, Amendment IV, states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not

be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

Former Health and Safety Code § 11170.5 provided:

"No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

Former Health and Safety Code § 11162.5 provided in relevant part:

" . . . An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment, but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of this division; and a person filling such an order, as well as the person issuing it, may be charged with violation of the law."

STATEMENT OF THE CASE

In an Indictment presented on June 19, 1973, by the Los Angeles County Grand Jury, petitioner MORRIS ABRAHAM GOLDSTEIN, and a co-defendant, NORMAN BERRY, were charged with thirty-three counts of violations of Health and Safety Code § 11170.5 (giving a false address in connection with the prescribing, furnishing, administering and dispensing of a narcotic), Health and Safety Code § 11163

(prescribing a narcotic not in the practice of his profession), Health and Safety Code § 11162.5 (prescribing narcotics to an habitual user or addict), and misdemeanor violations of Business and Professions Code §§ 2399.5 and 2426 (unlawfully prescribing a dangerous drug) (CT 1 - 31)[2].

Petitioner entered a demurrer to the Indictment, and the demurrer was sustained as to Counts XXIX, XXX and XXXI, the counts alleging misdemeanor violations of Business and Professions Code §§ 2399.5 and 2426. The demurrer was overruled as to felony counts–Counts I through XXVIII (CT 38). A motion to suppress prescription records seized from the co-defendant, NORMAN BERRY, without a warrant was heard pursuant to Penal Code § 1538.5 and denied by the trial court (CT 39).

The petitioner's motion to dismiss the Indictment under Penal Code § 995, and to strike certain Grand Jury exhibits, was subsequently denied (CT 49).

On November 21, 1974, DR. GOLDSTEIN withdrew his plea of not guilty as to Counts I and XII of the Indictment and pled guilty as to those counts, which charged violation of Health and Safety Code §§ 11170.5 (Count I) and 11162.5 (Count XII), respectively (CT 58).

Petitioner was granted probation for a period of three years, conditioned upon spending the first 90 days in the Los Angeles County Jail and paying a fine in the amount of $2,500.00 (CT 60). As a further condition of probation, the court ordered the petitioner not to write prescriptions for nor dispense any controlled substances as defined by Title 21, U.S.C. § 812, or which are the subject of federal licensing

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[2]CT refers to Clerk's Transcript on Appeal.

requirements (CT 62). The remaining counts of the Indictment were dismissed in the interest of justice.

Petitioner filed a timely Notice of Appeal. Petitioner is presently at liberty on bond. Petitioner's conviction was affirmed by the Court of Appeal of the State of California, Second Appellate District, on March 22, 1976. His Petition for Hearing before the California Supreme Court was denied on May 26, 1976.

REASONS FOR GRANTING A WRIT

1. California Health And Safety Code § 11170.5 Is Unconstitutionally Vague And Overbroad And Violates The Rights Of Doctors And Patients To Privacy Within The Doctor/Patient Relationship.

Health and Safety Code § 11170.5 provides: "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address." The Court of Appeal relied upon *People v. Anderson,* 29 Cal. App. 3d 551, 105 Cal. Rptr. 664 (1972), and *People v. Nunn,* 46 Cal. 2d 460, 296 P.2d 813, to argue by analogy to Health and Safety Code § 11162.5 that Health and Safety Code § 11170.5 is constitutional. The analogy upon which the court relies in its discussion of petitioner's contentions with regard to the unconstitutionality of § 11170.5 is misplaced. The Court of Appeal ignores the language of the statute and the conduct which it purports to proscribe and does not give separate consideration to the argument that the constitutional rights of doctors and patients, as well as criminal defendants, are violated thereby.

Petitioner contends that a person who wishes to get a medicine which may be necessary to his health, but does not want his name divulged to the government, suffers a penalty when he tries to protect his privacy. Petitioner also contends that there can be no "false" names, since a person has a right to choose any name he pleases under California law.

It is submitted that Health and Safety Code § 11170.5 is unconstitutional and void for reasons similar to those which led to the decision of the United States Supreme Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Court, in *Griswold,* relied on the "familiar principle" that a "governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms," and "we deal with the right of privacy, older than the Bill of Rights, older than our political parties, older than our school system . . . "; surely, the right of privacy involved in the patient/doctor relationship has the same sanctity as the relationship of husband and wife (see *Griswold, supra*), insofar as barring governmental intrusion is concerned. The instant statute sweeps too broadly (see *In re Castro,* 243 Cal. App. 2d 404 (1966)).

2. The Indictment And Resulting Conviction Were Based Upon Prescription Records Illegally Seized From Co-Defendant NORMAN BERRY In Violation Of The Fourth And Fourteenth Amendments.

Petitioner raises two arguments in support of his contention that the seizure of prescription records from co-

defendant BERRY was illegal. Petitioner contends that the consent to search obtained by District Attorney's Investigator Walters and Agent Kapelson of the Bureau of Narcotics was not voluntary, and even if the consent was voluntary, the resulting seizure exceeded the scope of the consent.

In "consenting" to the search, co-defendant BERRY was acting under compulsion of Business and Professions Code § 4232 which requires all California pharmacies to keep records of prescriptions which are subject to inspection by "any authorized officer or member of the Board."

It was established during the hearing of the Motion to Suppress that co-defendant BERRY, the pharmacist at Franklin Pharmacy, upon being confronted by DA's Investigator Walters, and Agent Kapelson, felt that he was *obliged* to allow these gentlemen to inspect his prescription files. Therefore, he "consented" after the officers identified themselves as peace officers and members of the State Bureau of Narcotics, because he thought they had a legal right to do so and that he had to cooperate (RT 40-41)[3].

It is axiomatic that the People have the burden of proof in showing a free and voluntary consent to a search and that even when consent is given, the scope of the search must be limited to that consent. *People v. Superior Court (Arketa),* 10 Cal. App. 3d 122 (1970); *People v. Gorg,* 45 Cal. 2d 776 (1955).

In this case, the authorities appeared at the Franklin Pharmacy and requested the inspection under color of their offices. In the instant case, the officers did not possess an inspection warrant (Code of Civil Procedure § 1822.50

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[3]RT refers to the Reporter's Transcript.

et seq.) when they went to search the pharmacy, and since MR. BERRY submitted to the search only because he was convinced of their authority to inspect his records, petitioner contends that the "consent" was involuntary and the subsequent search, therefore, illegal. *People v. Shelton,* 60 Cal. 2d 740 (1964); *Bumper v. North Carolina,* 391 U.S. 543 (1968).

Assuming, *arguendo,* that MR. BERRY did waive his Fourth Amendment rights by his consent to the officers' inspection of prescription records, there is nothing in the record to indicate that he consented to the seizure of the prescriptions in DR. GOLDSTEIN's name. MR. BERRY was not asked whether he would consent to the authorities keeping a prescription in the name of DR. GOLDSTEIN before they returned the remainder of his records.

It is well settled that a consent to search may be a limited one, and that an earlier consent cannot be extended to justify a later search. *People v. Gorg, supra; People v. Cruz,* 61 Cal. 2d 861 (1964).

Since the Fourth Amendment prohibits unreasonable searches *and* seizures, and since MR. BERRY had no opportunity to consent to or refuse the actual seizure of prescription forms, as opposed to the inspection thereof, it is submitted that the retention by the District Attorney's office of the prescription forms in question was an unlawful seizure.

3. The Search Warrant Authorizing The Search Of The Petitioner's Office Did Not Meet Constitutional Standards Of Specificity In Purporting To Authorize And Direct The Seizure Of "All Files, Professional Reports And Charts" Relating To Twenty-

Three Named Persons, And The Trial Court Erred In Denying Petitioner's Motion To Suppress The Evidence Taken From His Office.

In *Burrows v. Superior Court,* 13 Cal. 3d 238 (1974), a magistrate issued a warrant authorizing the search of an attorney's office for all books, records, accounts and bank statements and cancelled checks of the receipt and disbursement of money, and any file or documents referring to four named individuals. The Supreme Court of California concluded that the warrant, as interpreted and executed by the officers, was invalid because it was so broad that it authorized a general search of the defendant's offices, and because the declaration in support of the warrant justified the issuance of the warrant authorizing a search only for financial records relating to the persons named in the affidavit.

> "Both the Fourth Amendment to the United States Constitution and § 13, Article I of our State Constitution require that a warrant must particularly describe the place to be searched and the things to be seized. The requirement of particularity is designed to prevent general exploratory searches which unreasonably interfere with the person's right to privacy (citation omitted). The Penal Code demands reasonable particularity (Penal Code § 1529) and this requirement is held to be satisfied if the warrant imposes a meaningful restriction upon the objects to be seized." *Burrows, supra,* at p. 249.

The warrant in the present case authorized a seizure of "all files, professional reports and charts under the names

of . . . " twenty-three persons. The affidavit for the search warrant detailed a rather lengthy investigation of DR. GOLDSTEIN's activities by the District Attorney's office. Additionally, the magistrate was presented with Exhibits "A" through "Q" representing prescription records seized from the Franklin Pharmacy and Val's Pharmacy. Upon each exhibit the affiant, District Attorney's Investigator David Walters, recorded the name of the person to whom the prescription was issued, the amount of the substance prescribed per month, the name of the substance, and the pharmacy selling the prescription. Probable cause for the seizure of files of sixteen of the twenty-three named persons was established solely on the basis of the compiled records of prescriptions dispensed to these persons–Sanford Blixton, John Diggs, Rocky Mejia, Dan Gideon, Al Gideon, Penny Stringer, Jerry Stringer, Aubert Farrell, John Staley, Alberta Angelotti, Marion Farrell, Eva Zarate, Rita Aguilar, James Hooper, Betty Williams, and John Williams. Seventeen medical files were seized pursuant to the search warrant.

The warrant in the present case does not meet constitutional standards of specificity because it directed the seizure of "all files, professional reports and charts," whereas it should have authorized only the seizure of the medical files of the named persons. *Marron v. United States,* 275 U.S. 192 (1927); *Stanford v. Texas,* 379 U.S. 476 (1964).

In *Burrows, supra,* at pages 250-251, the court states:

> "Assuming arguendo that the warrant is severable, the direction to seize 'any file or documents' relating to the Millers is too broad to comport with constitutional requirements. The information upon which the warrant was based justified

> a search of petitioner's files only for financial records relevant to the Miller transaction. The phrase 'any file or documents' could well include material of a highly personal nature confided by Miller to petitioner or revealed by petitioner's own investigation of the Millers' background. Moreover, . . . the lawyer/client privilege protects confidential communications between an attorney and his client (Evidence Code § 954), and the privilege was clearly violated by the failure of the warrant to limit the search to material relevant to the charge of misappropriation."

In the instant case, the physician/patient privilege (Evidence Code § 994) has been violated. The reasoning of the court in *Burrows, supra,* is equally applicable here.

The Court of Appeal refused to consider petitioner's contention that his Motion to Suppress Evidence was improperly denied. The court relied on its finding that there were no charts or records seized for either Zoltan Szoenyi or Virginia Hale (Appendix "B" p. 14); therefore, the court stated, "No evidence was seized from [petitioner's] office as to counts I and XII and [petitioner's] motion to suppress therefore did not refer to any evidence supportive of those counts" (Appendix "B" p. 14).

In a recent opinion of the Supreme Court of California, *People v. Rios,* 16 Cal. 3d 351, 358 (1976), in quoting from *People v. Hill,* 12 Cal. 3d 731, 769, it was stated:

> "In view of the magnitude of the consequences of a guilty plea and the lack of an adequate basis upon which an appellate court can evaluate the

> impact of a trial court's error, we conclude that the doctrine of harmless error is inapplicable in the context of an appeal under § 1538.5(m). The accused must be afforded an opportunity to personally elect whether, contrary to the trial court's ruling,the suppression of certain items of evidence would alter the situation in a sufficiently favorable manner so as to render a plea of not guilty strategically preferable."

The court in *Rios, supra,* went on to state, 16 Cal. 3d at 356:

> "Because we cannot measure the prejudice suffered by the defendant without engaging in impermissible speculation, he is entitled to be restored to the position he would have enjoyed had the court properly ruled on the motion in the first instance."

The ruling of the Court of Appeal in the instant case, and the denial of a hearing by the Supreme Court of California, denied petitioner the opportunity to "be restored to the position he would have enjoyed had the court properly ruled on the motion in the first instance." That no items of evidence which petitioner contends were illegally seized were relevant to the charges to which he entered his guilty plea does not render moot petitioner's appeal from the denial of his motion to suppress.

4. Petitioner Was Denied Equal Protection And Due Process Of Law By The Failure Of The California Courts To Consider Petitioner's Attack On The Jurisdiction Of The Superior Court.

Petitioner submits that he has been denied due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution by virtue of the trial court's and the appellate courts' abdication of their duty to apply California statutes which were enacted to guarantee procedural safeguards to persons who have been indicted by a Grand Jury. In California, the Legislature has provided two ways in which the prosecutor may elect to bring criminal charges against a defendant. He may conduct a preliminary examination, whereat the defendant is not only entitled to appear with counsel but also may confront and cross-examine witnesses and make appropriate evidentiary objections as well as motions to suppress and for discovery. Alternatively, the prosecutor may elect to present the case to the Grand Jury for indictment, in which case any challenge to the validity of the indictment–and, hence, defendant's commitment–must be made in the trial court (rather than before a committing magistrate).

In any event, the California Legislature has provided, by statute, that the Grand Jury's finding of probable cause for indictment may be attacked on each and every ground that a magistrate's commitment could be attacked after preliminary examination. Penal Code §§ 995 through 999(a). Thus, a defendant may challenge an indictment based upon inadmissible evidence and, in fact, Penal Code § 939.6(b) requires that "the Grand Jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action . . . . "

Hence, in order to compensate the criminal defendant for the valuable rights of which he is deprived when the prosecutor elects to proceed via the Grand Jury rather than

via a preliminary examination, the California State Legislature saw fit to provide defendant with a vehicle for challenging the evidence produced before the Grand Jury and, hence, the legality of the commitment.

In the case at bar, petitioner made repeated challenges both in the trial court and the appellate courts to the competency and admissibility of the evidence produced before the Grand Jury. The trial court dismissed petitioner's motion to strike inadmissible evidence out of hand and without comment. The Court of Appeal purported to sidestep the issue in a footnote noting that defendant's guilty plea precluded him from any appellate review of the sufficiency of the evidence presented to the Grand Jury.

The flaw in the appellate court's reasoning lies in the fact that petitioner was granted a statutory right to appeal under Penal Code § 1237.5. The trial court issued a Certificate of Probable Cause in order that petitioner might receive appellate review on precisely the point the Court of Appeal felt entitled to ignore. The question then becomes: What use is a statutory right to appeal when the appellate court feels free to ignore the issue which gave rise to the appeal?

Moreover, the appeal expressly attacked the legality of the commitment; that is, the admissibility of evidence before the Grand Jury.

The Supreme Court of California, in *People v. Elliot*, 54 Cal. 2d 498 (1960), specifically held that the violation of a statutory right granted the defendant would result in a void commitment and the loss of jurisdiction by the Superior Court. *Elliot* stands for the proposition that an indictment which has not been legally brought is void.

So long as an objection has been made, a subsequent guilty plea cannot amount to a waiver of the defect, inasmuch as the court lacks jurisdiction in the first place.

Appellate review having become an integral part of California's trial system for adjudicating guilt or innocence, at all stages of the proceedings the due process and equal protection clauses of the Fourteenth Amendment protect persons from invidious discrimination. *Griffin v. Illinois,* 351 U.S. 12 (1956). Once a state has established an avenue of appellate review, that avenue must be kept free of unreasonable distinctions that can only impede open and equal access to the court. *Williams v. Oklahoma,* 395 U.S. 458 (1969); *Ross v. Moffitt,* 417 U.S. 600 (1974).

In the case at bar, petitioner has been denied equal protection of the law in that the prosecutor's election to proceed by way of indictment rather than preliminary hearing has resulted in his being deprived of a meaningful review of the admissibility of evidence submitted to the Grand Jury. This is notwithstanding his statutory right to challenge that evidence both at the trial level (Penal Code § 995) and on appeal (Penal Code § 1237.5).

As a general rule, the interpretation of state constitutions and state laws is a matter to be left to the state courts. See *Hebert v. Louisiana,* 272 U.S. 312. However, once a state has granted certain procedural rights to criminal defendants by state law, then those rights become federal guarantees of equal protection and due process through the Fourteenth Amendment. See *Silva v. Cox,* 251 F.2d 61 (10th Cir. 1965). The unequal application of the law to petitioner is obvious in this case in that he was denied the right guaranteed to all defendants by California law.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the questions raised herein.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

INDEX TO APPENDIX

		Page
"A"	Post card denial of hearing in the Supreme Court of the State of California	1
"B"	Opinion of the Court of Appeal of the State of California, Second Appellate District	2

APPENDIX "A"

DENIAL OF HEARING
IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 26, 1976

I have this day filed Order _____

HEARING DENIED

In re: 2 Crim. No. 26911

People

vs.

Goldstein

Respectfully,

G. E. BISHEL
Clerk

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

NOT FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MORRIS GOLDSTEIN, Defendant and Appellant.

2d Crim. 26911 – LASC A.-298228

[FILED MARCH 22, 1976]

The defendant, Morris Goldstein, M.D., entered a plea of guilty to the crime of giving a false address in connection with the prescribing of a narcotic in violation of Health and Safety Code section 11170.5[1] (count I) and to the crime of unlawfully prescribing narcotics to a habitual user or addict in violation of Health and Safety Code section 11162.5[2] (count XII) as charged in an indictment by the Los Angeles County Grand Jury in Los Angeles Superior Court case No.

[1]Currently section 11174. Stats. 1972, ch. 1407, p. 3004, § 3.
Former Health & Saf. Code, § 11170.5 provided: "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

[2]Currently section 1153. Stats. 1972, ch. 1407, p. 3001, § 3.
Former Health & Saf. Code, § 11162.5 provided in part: " . . . An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of this division; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law."

A 298 228. The remaining counts were dismissed in furtherance of justice. Proceedings were suspended without imposition of sentence, and the defendant was placed on probation for a period of three years upon certain terms and conditions. Defendant appealed from the judgment of conviction and a certificate of probable cause for appeal (Pen. Code, § 1237.5) was granted by the court.[3]

The facts adduced at the grand jury proceedings were as follows: Sam Kapelson, a narcotic pharmacist agent for the California Bureau of Narcotic Enforcement, had the duty of investigating forged and illegal prescriptions. Under state and federal law, the dispensing of specified narcotics requires that a prescription form be filled out by the doctor in triplicate and such prescriptions may not be issued by telephone. The patient gets the original and duplicate copy of the prescription which he then takes to a pharmacy. A tissue copy (which is the doctor's copy) remains in the book. The pharmacist then retains the original in his file and forwards the duplicate copy to the Bureau of Narcotic Enforcement at the end of the month. In the lower left hand corner of the triplicate prescription is the Bureau of Narcotic and Dangerous Drugs number (B.N.D.D. number) which identifies each physician. Each doctor has a different number. Defendant's B.N.D.D. number is AG 1416773. On the top of the prescription is another number imprinted in red ink which has been issued to each doctor. The last two digits are in series of a hundred, going from 00 to 99. Defendant's number was

[3]Since defendant pled guilty to counts I and XII, he is not now entitled to any review on his contention that his 995 motion should have been granted (as to counts I and XII) on the ground that the evidence before the grand jury was insufficient to establish probable cause for the indictment. (*People v. Warburton*, 7 Cal. App. 3d 815, 820-322.)

"8864E - - . " No other doctor in the state would receive this series number.

On February 20, 1973 Mr. Kapelson inspected the files of the Franklin Prescription Pharmacy in Santa Monica, together with other investigators, including other agents from the Bureau of Narcotics Enforcement and District Attorney's Investigators Travier and Walters. Prior to his examination Mr. Kapelson identified himself and explained his purpose to the pharmacist, Norman Berry.[4] Deputy Walters asked Berry if he could remove some of the files. Berry consented, showing them where the files were, how they were placed, and generally told them exactly where everything was. Included among the prescriptions they removed during their investigation were prescription numbers 8864E57 through 63, 8864E65 through 70, 8864E73 through 91 (Grand Jury Exhibit 4). From these records lists were compiled for eight different persons, summarizing the amounts and types of drugs prescribed for each person by month and year (June 1971 through February 1973).

Introduced into evidence (People's Exhibits 4 and 5) were prescriptions (each of which was for 100 dosage units of Percodan) bearing defendant's number and signed by "Morris A. Goldstein, M.D." which had been to "Mr. Z. Szoenyi" at 943 Euclid, Santa Monica (dated January 2, 1972); "Virginia Hale" at 3240 Westwood Boulevard (a nonexistent address); "Patricia Wamsley" or "Wamsly" at 2347 Third Street, Santa Monica (which was actually in the area of a large park); "Virginia Hale" at 3648 Westwood Boulevard;

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[4]Norman Berry was named as a codefendant and charged in count II with a violation of Health & Saf. Code § 11501 (currently § 11352. Stats. 1972, ch. 1407, p. 3013, § 3), unlawful sale of the narcotic Percodan.

and "Virginia Hale" at 943 Euclid Avenue, Santa Monica.[5] Among these prescriptions was one bearing number 8864E64 (contained within Grand Jury Exhibit 5). This prescription for 100 units of Percodan was issued to "Virginia Hale" at 943 Euclid Avenue in Santa Monica and dated December 21, 1971. It was written by defendant giving his address as 1608 Pacific Avenue, Venice, California. The B.N.D.D. number was AG 1416773.

Zoltan Szoenyi, 17 years of age, testified that he knew defendant. He also had known "Virginia Hale" and her daughter, Carol Lynn Zarate, for about four years, and considered himself a boyfriend of both. Virginia Hale used a number of aliases, including "Zarate" and "Szoenyi." In the latter part of 1971 or early part of 1972, he had been addicted to heroin, and as a result was sent to a Juvenile Detention Camp. Among the drugs that he had gotten from defendant was Quaalude which he had received on numerous occasions. He stated that he would go to defendant's office "very seldom" and was never given a physical examination, but once when he went to the office defendant took his blood pressure, after he told defendant that he couldn't sleep and was addicted to heroin.

Szoenyi also stated that Virginia Hale was addicted to heroin and pills (Tuinals, yellows, barbiturates and Percodan). She would get them from Val's or Franklin Pharmacy. Before he went to the camp, Virginia told him that she "was strung out on heroin for a long time," and that her veins were not "good any more." She injected narcotics in her wrists. Carol Lynn also took pills. Szoenyi

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[5]Virginia Hale was deceased at the time of the grand jury proceedings.

used to see defendant at Virginia's house "all the time." Defendant always brought with him his "little black bag," and Virginia used to tell him that he "brung a bunch of Tuinals or whatever." Szoenyi would get pills from Virginia.

Roland Roth, operator of the Sun Bay Motel in Culver City, met defendant when he checked into the motel with a lady identified as Virginia Hale, stating that he was her physician. Defendant paid for the room and signed the room registration cards (Grand Jury Exhibits 6, 7 and 8). Virginia stayed there a week.

Laurence Moute, an examiner of questioned documents and expert in comparison of handwriting, compared the writings on Grand Jury Exhibits 6, 7 and 8 (the motel registration cards from the Sun Bay Motel bearing Virginia Hale's name) with the writings on Exhibit 4 (originals of the triplicate prescriptions) and Exhibit 5 (duplicate copies of prescriptions bearing numbers 8864E64, -71 and -72), and formed the opinion that they were probably written by the same person.

Leslie Barnum, a deputy probation officer, testified that Zoltan Szoenyi was checked into camp on December 28, 1971 and the first time he left the camp was January 14, 1972, on temporary furlough.

On May 16, 1973 Deputy Walters, together with other officers, served a search warrant (Grand Jury Exhibit 33) at defendant's office to obtain certain medical records specified in the warrant. Defendant "indicated his willingness to help us locate the files." When the officers could not locate a certain file, defendant told them where they might find it and also looked himself. They were unable to find a medical chart for "Virginia Hale," also known as "Virginia Zarate,

Mrs. Z. Szoenyi, Zoldeana Szoenyi, and Virginia Conti." Defendant indicated that "she was a very dear friend and that there was no chart." They were also unable to locate a chart for Carol Lynn Zarate, also known as "Tanya Guerrera, Zoltanya Szoenyi, and Carol Conti." Defendant indicated that this was Virginia's daughter and that there was no chart. Neither defendant nor the officers could find a chart for Zoltan Szoenyi. Their search took approximately one hour.

Carol Lynn Zarate, 15 years old, testified that she had known defendant for 8 or 9 years and had met him through her grandmother, and then her mother had introduced her to him. She has mostly used Nembutal and Percodan and heroin "a bit." She would inject herself with all three of the drugs. She stated that she would get the Nembutal and Percodan from defendant by going to his office, usually with her mother, and then going to the drugstore with defendant where he would pick up the prescription for her. She never had to pay for the drugs. Her mother, Virginia, had been a drug addict for so long"at that time" it was impossible for her to inject into her arm so she would use her ankles or the back of her hands. She could not function without having any kind of drugs, which would include Percodan. Carol had seen her mother go through "withdrawals" twice. On September 8, 1972, Carol was arrested for possession of a bottle of Nembutal which she had received from the Franklin Pharmacy. These pills had been purchased by defendant while she and her mother waited outside in the car. During the early part of 1972 she and her boyfriend, Zoltan Szoenyi, were addicted to heroin. Defendant was not treating her for any illness, nor

was she aware of any medical records in her name at his office.

On January 18, 1972, Officer Rice arrested a woman called "Szoenyi" for a violation of section 647, subd. (f), drugs. The woman was Virginia Hale. During a booking search he found Percodan and Tuinal from the Franklin Pharmacy in her purse. The prescription label on the vial of Percodan (Grand Jury Exhibit 19) was made out to "Mrs. Z. Szoenyi at 943 Euclid Avenue." She was arrested with an 18-year old boy named Geola Szoenyi.

Eva Zarate, Virginia's ex sister-in-law, testified that she saw Virginia at defendant's office "all the time." Virginia would "go every day to see him [defendant]."

Albert Zahn, a medical doctor in general practice and internal medicine, worked as a consultant for the Santa Monica Police Department examining patients. He stated that it is customary for doctors to prepare a medical chart for each patient when prescribing drugs; and every time the patient visits, this is charted. He also stated that Percodan was an analgesic, a "little bit stronger than Empirin Number 4." Dr. Zahn was presented with the list of prescriptions for drugs dispensed to Virginia Hale, and in his opinion, Virginia Hale, by September 1972, was an habitual user of Percodan and it would have been normal medical practice to have a medical chart of this person.

The facts adduced at the hearing on defendant's Penal Code section 1538.5 motion were as follows: On February 20, 1973, Sam Kapelson, special agent with the Bureau of Narcotic Enforcement, went with other officers to the Franklin Pharmacy in Santa Monica and told the pharmacist, Norman Berry, that they were there to look through the

controlled substances prescription files. Kapelson then asked if they could go in the back of the pharmacy and go through these files. Berry replied, "Go ahead," and showed the officers where the files were located. Because there were quite a few files, they asked Berry if they could take the files to the District Attorney's office in Santa Monica for three or four hours. Berry said that was satisfactory. After they looked through the files, all were returned except for the ones which were seized.

Officer Rice's testimony was essentially similar to that given at the grand jury inquiry.

Berry testified that he agreed to let the officers look at the pharmacy files because he thought "they had the right to do so" and he thought he "had to cooperate."

Defendant contends that he was charged under statutes (Health & Saf. Code, §§ 11162.5 and 11170.5) which were "repealed at the time of the indictment and which were not saved by any savings clause." He argues that the Legislature, by adding a new division (Division 10) to the Health & Safety Code and repealing the former statutes and renumbering them, intended to save only those prosecutions that were pending at the time of the repeal and that the enactment of the specific "savings" statute[6] is a sufficiently explicit declaration of the Legislature's intent as required under Government Code section 9608.[7] This contention is totally without merit. On

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[6]Defendant refers specifically to the savings clause contained in Health and Safety Code section 11650, subd. (a), which provides that "Prosecution for any violation of law occurring prior to the effective date of this division is not affected or abated by this division. If the offense being prosecuted is similar to the one set out [in the new act, and the penalties are less in the new act, then the lesser penalty shall apply] . . . . "

[7]Gov. Code, § 9608 provides: "The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed

December 27, 1972 (effective March 7, 1973),[8] the Legislature enacted the Uniform Controlled Substances Act, repealing divisions 10, 10.5, 10.8, and 10.9 of the Health and Safety Code, and re-enacted what were formerly Health and Safety Code section 11162.5 and 11170.5, now sections 11153 and 11174.

It is well established that the rule which bars prosecution under a repealed law for offenses occurring before repeal does not apply where there is an outright repeal and there is a substantial re-enactment, because it will be presumed that the legislative body did not intend that there should be a remission of crimes not reduced to final judgment. " ' When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because, obviously, in such event the intent of the Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.' [Citations.]" (*In re Dapper,* 71 Cal. 2d 184, 189.)

Clearly, in the present case, the Legislature did not intend to provide a form of "amnesty" to those who had

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7 cont'd

in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law."

[8]Defendant's indictment was brought June 19, 1973, for acts and offenses allegedly committed during 1971, 1972 and 1973.

violated former sections 11162.5 and 11170.5, but who had not yet been prosecuted before the effective date of the repeal of the statutes.

Defendant further contends that former Health and Safety Code section 11170.5 is unconstitutional, as well as section 11162.5, in that such statutes violate the defendant's and his patients' privilege against self-incrimination, right to privacy, right to free speech and due process of law. He further argues that the patient-physician relationship is infringed by section 11170.5 and that such statute "sweeps too broadly." Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. Furthermore, in the field of "regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed" than in statutes applicable to the general public. (*Papachristou v. City of Jacksonville,* 405 U.S. 156, 162; *People v. Anderson,* 29 Cal. App. 3d 551, 561.) Section 11162.5 was specifically held constitutional in *People v. Bowman,* 156 Cal. App. 2d 784, 799-800. In *People v. Nunn,* 46 Cal. 2d 460, 467-469, the court upheld the constitutionality of Health and Safety Code sections 11163, 11164 and 11330, pertaining to the issuance of prescriptions for narcotics, to the prohibition of prescribing narcotics to a person representing himself to be an addict, and to the prohibition of prescribing narcotics to a person not under treatment for a pathology. The court in *Nunn* stated at page 469: "The Legislature has the power to regulate the practice of a profession which affects the public health and safety." Former section 11162.5 has also been held not unconstitutionally vague as to its terms or meaning in *People v. Anderson, supra,* 29 Cal. App. 3d

551, 559-561. The rationale used in *Anderson*, finding section 11162.5 constitutional, is applicable to former section 11170.5, since that section deals also with the improper administration of narcotics by use of false prescriptions. Defendant's reliance upon *Grosso v. United States*, 390 U.S. 62, and *Marchetti v. United States*, 390 U.S. 39, is misplaced. In both those cases it was held that compelling information as to a person's bookmaking and gambling status for federal tax purposes was incriminatory to the person required to give such information. Section 11170.5, however, does not compel the giving of *true* information which leads to criminal sanction but forbids the giving of *false* information which is necessary to protect the state's interest in regulating unlawful narcotic prescriptions to addicts. (*Cf. California v. Byers*, 402 U.S. 424, 427-434.) Defendant's contention that former section 11170.5 infringes upon the patient-physician relationship is without merit. As the court said in *United States v. Collier*, 478 F.2d 268 at page 274: "[Defendant's] last contention is that there is a constitutionally protected right to privacy in the physician-patient relationship which is violated by the Comprehensive Drug Control Act [21 U.S.C.A. § 801 et seq., providing for criminal sanctions for improper prescriptions of narcotics to addicts by doctors]. We find this contention meritless. Appellant has ignored the fact that the statute does not invade the legitimate doctor-patient relationship when the doctor may dispense or prescribe drugs for medical reasons, but bars only activities outside the physician's professional practice, when a physician acts, in essence, as a 'pusher.' There is no constitutional protection of such activity." Contrary to defendant's assertions

section 11170.5 does not "sweep too broadly." Such statute specifically defines the prohibited conduct, i.e., issuing a prescription with a false name or address. There is no constitutionally protected "right" to falsify a prescription required to be kept by state law in order to conceal the true recipient of the narcotic from the authorities. Both sections 11170.5 and 11162.5 are constitutional and are not overly broad in limiting dispensation of drugs or narcotics by physicians.

Defendant also contends that the prescription forms were "illegally seized from codefendant Norman Berry." As previously set forth, Berry testified that he consented to the inspection of the files in a willing manner. At the 1538.5 hearing he stated that he told the officers to "go ahead and look." There is no indication in his testimony that such consent was involuntary, was coerced, or was given in response to an express or implied assertion of administrative authority. The officers merely asked his permission to look at the files and he agreed. There was no unlawful search or seizure and the grand jury exhibits were properly received into evidence.

There is no merit to defendant's contention that the files seized from his office pursuant to a search warrant were unlawfully seized because the search warrant was "overbroad" in authorizing a seizure of "all files, professional reports, and charts under the names of . . . " twenty-three different persons. "[A] warrant must particularly describe the place to be searched and the things to be seized. The requirement of particularity is designed to prevent general exploratory searches which unreasonably interfere with a person's right to privacy. [Citation.] The Penal Code demands reasonable particularity. (Pen. Code, § 1529), and this requirement is

held to be satisfied if the warrant imposes a meaningful restriction upon the objects to be seized." (*Burrows v. Superior Court,* 13 Cal. 3d 238, 249.) Here, the warrant specified seizure only of those "files, professional reports, and charts" of certain named persons. The warrant, together with the accompanying affidavit, met the constitutional standards of specificity.

Moreover, there were no charts or records seized for either Zoltan Szoenyi or Virginia Hall. No evidence was seized from defendant's office as to counts I and XII and defendant's motion to suppress therefore did not refer to any evidence supportive of those counts. The records seized from defendant's office related to other counts involving other individuals. These counts were dismissed in the interests of justice. Defendant's reliance upon *Burrows v. Superior Court, supra,* 13 Cal. 3d 238, and *People v. Hill,* 12 Cal. 3d 731, is misplaced since in both cases documents were illegally seized for use against the accused as evidence relating to the criminal offenses to which he had pled guilty or of which he had been found guilty. Here, no evidence seized in defendant's office pursuant to the search warrant was used against defendant as evidence relating to either count I or XII.

Defendant also contends that "the trial court committed reversible error at the time of sentencing by permitting the District Attorney to argue in aggravation of the punishment to be imposed." Such contention is without merit. Penal Code section 1204 provides that proof of circumstances in aggravation or mitigation of punishment must be presented by the testimony of witnesses examined in open court. This section also provides, inter alia, that no

representation can be made to the court in aggravation or mitigation of the punishment except as provided in that section and Penal Code section 1203 providing for the making of probation reports by the probation officer. Penal Code section 1203.01 provides that the prosecutor may cause to be filed with the court his views after judgment has been pronounced, and if no probation officer's report has been filed, he must file such statements with the court. At the probation hearing in the present case, the deputy district attorney only commented upon the evidence that had been presented at the trial and the facts stated in the probation officer's report. "It is a well-established principle that it is within the domain of legitimate argument for a prosecutor to state his deductions or conclusions drawn from the evidence at trial." (*People v. Vatelli,* 15 Cal. App. 3d 54, 63.) The deputy district attorney, as well as defense counsel, had a right to argue at the probation and sentence hearing. From the record it appears that the deputy district attorney was well within the legitimate scope of legal argument. (See *People v. Jackson,* 36 Cal. 2d 281, 286-287; *cf. People v. Barajas,* 26 Cal. App. 3d 932, 937.)

The judgment is affirmed

NOT FOR PUBLICATION.

HASTINGS, J.

We concur:

KAUS, P.J.

STEPHENS, J.

Los Angeles Superior Court No. A-298228
Frank Baffa, Judge

Attorneys for Appellant: Burton Marks
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Deputy Attorneys General.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on AUGUST 20 1976, I served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA in the matter of MORRIS GOLDSTEIN vs. THE STATE OF CALIFORNIA, on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

CLERK OF THE SUPREME COURT
STATE OF CALIFORNIA
4050 State Building
350 McAllister Street
San Francisco, California
(1 copy)

CLERK OF COURT OF APPEAL
SECOND APPELLATE DISTRICT
3580 Wilshire Boulevard
Los Angeles, California 90010
(1 copy)

ATTORNEY GENERAL
STATE OF CALIFORNIA
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Los Angeles, California 90010
(3 copies)

CLERK OF SUPERIOR COURT
COUNTY OF LOS ANGELES
Criminal Courts Building
210 West Temple Street
Los Angeles, California 90012
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 20th 1976, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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